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DISCRIMINATION AGAINST INDIGENOUS PEOPLES

Written statement submitted by the Four Directions Council,
a non-governmental organization in consultative status
(category II)

The Secretary-General has received the following communication which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

[3 July 1991]

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PROTECTION OF CULTURAL PROPERTY - PART II

International standards and mechanisms

1. The principal instrument in this field, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), has several serious limitations. Both of the States involved in a dispute must be parties to the Convention, and the removal of the object from its country of origin must have occurred after the Convention came into force in both States. Most major art-importing States, such as France, Germany, the United Kingdom and Japan, are, moreover, not parties. Indigenous peoples lost much of their cultural property before 1970, and a large part was exported to non-party States. The OAS Convention on the Protection of The Archaeological and Artistic Heritage of the American Nations (The Convention of San Salvador, 1976), takes the same approach and has the same shortcomings.

2. In 1978, UNESCO also established the Intergovernmental Committee for Promoting the Return of Cultural Property to its Country of Origin with a mandate to undertake good offices and mediation at the request of States, and to organize projects with (for example) ICOM and UNESCO National Committees for conducting inventories of cultural property. These resources are not yet available to indigenous peoples, and the Committee has avoided disputes between States and their constituent peoples. For example, it declined to take up Scotland's claims to the Stone of Scone, for example, regarding it as an internal affair of the United Kingdom.

3. The International Institute for the Unification of Private Law (Unidroit) has prepared a draft Convention on Stolen or Illegally Exported Cultural Objects, (Study LXX, Doc. 19 (1990)). The Unidroit draft opens the courts of each contracting State to claims by the others and requires "compensation" to be paid by the States making claims to innocent purchasers of stolen cultural property. It permits (but does not require) the retroactive application of its provisions. It also prescribes a number of factors to be considered by courts when determining whether to return a particular object. These include the "outstanding cultural importance" of the object to the claiming State, as well as its "use by a living culture" within that State. This last provision is of particular relevance to indigenous peoples.

4. Some forms of cultural property are also eligible for protection as intellectual property. The Berne Convention for the Protection of Literary and Artistic Works, as amended in 1971, authorizes States to designate "competent authorities" to control the licensing and use of folklore. In 1982, WIPO drafted Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, which include the tangible expressions of culture such as pottery, costumes, jewellery, and basketry. A State could, consistent with the Berne Convention, delegate responsibilities for the definition, protection and licensing of folklore to indigenous peoples themselves.

5. Several international human rights instruments contain provisions which could be utilized to protect cultural property. Article 15 (2) of the International Covenant on Economic, Social and Cultural Rights requires States

to take steps for the "conservation" of culture, and article 27 of the International Covenant on Civil and Political Rights guarantees the right of minorities to enjoy their own cultures and to practise their own religions. Article 5 (d) (v) of the International Convention on the Elimination of All Forms of Racial Discrimination prohibits discrimination with respect to the ownership, individually or collectively, of property. Failure to protect indigenous peoples' collective ownership of important cultural and religious objects may undermine their culture and religion, and constitute discrimination.

Recommendations

6. UNESCO should be encouraged to develop a comprehensive approach to the protection of indigenous peoples' cultural property, including:

(a) Documenting and widely publicizing traditional law regarding cultural property, with the assistance of indigenous peoples;

(b) Providing assistance to indigenous peoples for inventories of museum collections, and for recovering and conserving objects;

(c) Giving the Intergovernmental Committee an explicit mandate to assist indigenous peoples in the recovery of their cultural property.

7. WIPO should be invited to organize one or more regional seminars on strengthening the use of the Berne Convention to protect indigenous peoples' cultural property, with the participation of Governments and indigenous peoples' organizations. WIPO should also be encouraged to consider developing a programme of technical assistance to indigenous peoples in this field.

8. The Centre for Human Rights should assist Mrs. Daes in preparing a briefing for the members of the principal human rights supervisory bodies on the application of human rights standards to these issues. Indigenous peoples should likewise be made aware of the opportunity to challenge the export of cultural property through communications under the Optional Protocol, directed against the importing and/or exporting States.

9. UNESCO, WIPO and the Centre for Human Rights could develop such programmes as contributions to the International Year for the World's Indigenous People (1993).